STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 7, 2010
v ERIC EUGENE LIVELY, Defendant-Appellant.	No. 284525 Wayne Circuit Court LC No. 04-011339-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SHEILA MARIE LIVELY, Defendant-Appellant.	No. 284567 Wayne Circuit Court LC No. 04-011339-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Following a consolidated trial with codefendant Sheila Lively (Shelia), a jury convicted defendant Eric Eugene Lively (Eric) of possession with intent to deliver methylenedioxymethamphetamine (commonly known as "Ecstasy"), MCL 333.7401(2)(b)(i), and possession of marijuana, MCL 333.7403(2)(d).[1] The trial court sentenced him to 8 to 20 years in prison for the possession with intent to deliver Ecstasy conviction and 44 days in jail, with credit for 44 days served, for the possession of marijuana conviction.

[1] Eric was acquitted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b.

The jury also convicted Sheila of possession of marijuana and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b.[2] The trial court sentenced her to five days in jail, with credit for five days served, for the possession of marijuana conviction, and two years in prison for the felony-firearm conviction. Eric appeals as of right in Docket No. 284525 and Sheila appeals as of right in Docket No. 284567. These appeals have been consolidated pursuant to MCR 7.211(E)(2). We affirm.

I.

This case arises out of the execution of a search warrant at defendants' home at 608 Poplar Street in Wyandotte on August 17, 2004. Sheila's son, Harold Hammond, was home at the time of the search, but defendants were not. As this Court previously noted in *People v Lively*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket Nos. 264222 and 264223), slip op, pp 2-3:

> A magistrate issued a warrant permitting a search of 608 Poplar Street in Wyandotte. In the affidavit in support of the warrant, Wyandotte Police Detective Scott Galeski stated that police had responded to an unnamed "victim" who was running and yelling through the city streets, complaining that people with guns were following him and that he had been sexually assaulted. After the victim was hospitalized, he was again interviewed and, at that time, he told Galeski that none of those events had taken place; that he had been using alcohol, marijuana, and ecstasy at the time; that he had purchased the illegal narcotics from a Roosevelt High School student by the name of Harold Hammond, whose nickname was "Tuffy"; and that the transactions had taken place out of Hammond's residence at 608 Poplar Street. The affidavit further stated that Galeski had verified Hammond's identity and address through an in-house computer check and through Roosevelt High School officials. Furthermore, the affidavit alleged that trash bags removed from the curb outside the Poplar Street address contained marijuana stems, seeds, and packaging, as well as evidence of residency.
>
> A search of the Poplar Street residence resulted in the seizure of 127 ecstasy tablets and nine individually-wrapped baggies of marijuana, an unloaded semi-automatic pistol and ammunition, currency, and rave equipment from defendants' upstairs bedroom.[3] In a basement room belonging to Hammond (defendant Sheila Lively's son), marijuana and a price sheet for drug sales were found. Officers also found a bag containing marijuana residue, a gas mask, rave equipment, narcotics packaging that matched the packaging located in the upstairs bedroom, a black light, and a "bong" in [a Chrysler Sebring registered to Sheila Lively].

[2] Sheila was acquitted of possession of Ecstasy, MCL 333.7403(2)(b)(i).

[3] At trial, Eric testified that the tablets and baggies of marijuana were in his dresser, whereas the gun registered to Sheila and her gun permit were in her dresser. Eric claimed that he did not know that Sheila had a gun or stored it in her dresser.

Defendants moved to suppress evidence obtained from the search. The trial court found the informant unreliable, noting "he retracted everything that he had given to the police, saying that it was not true and that . . . he was under the influence of drugs or something at the time that he gave it." The trial court also found that the affidavit lacked specificity with respect to the garbage bags removed from the curb outside defendants' home. Consequently, the trial court granted defendants' motions and dismissed the charges against them.

The prosecutor appealed the trial court's dismissal of the charges, and this Court found no reasonable basis for concluding that, even though the informant retracted his first statement about being followed and sexually assaulted, his second statement, which was verified for accuracy, was unreliable. *Lively I*, *supra* at 6. This Court also found that the police search of the garbage bags corroborated the informant's second statement and further supported probable cause. *Id.* at 7. It noted that no independent corroboration of the marijuana found in the garbage bags was required. *Id.* at 7-8. Because the totality of the affirmative allegations set forth in the affidavit supported the issuance of the search warrant, this Court reversed and remanded for reinstatement of the charges against defendants. *Id.* at 8-9. The Supreme Court subsequently denied defendant's application for leave to appeal this Court's decision. *People v Lively*, 477 Mich 1059; 728 NW2d 426 (2007) ("*Lively II*").

At trial, Detective Galeski testified that he interviewed Eric after the search. During the interview, Eric admitted that: 1) he stored Ecstasy and marijuana for personal use by defendants, 2) he also stored Ecstasy for a friend and was trying to give it back to the friend at the time of the search, 3) defendants had used Ecstasy with friends, who reimbursed Eric for the cost of the drugs, 4) defendants occasionally gave a "couple" Ecstasy pills to Hammond and Eric was unsure whether Hammond used or sold them, and 5) the money the police recovered during the search was earned by defendant's in their jobs, as well as through the sale of drugs.

Eric subsequently testified that he lied to Detective Galeski during the interview to protect Sheila and Hammond. He further claimed that Detective Galeski promised not to charge his family. Contrary to his statements during the interview, Eric denied providing Hammond with Ecstasy or selling drugs. However, he admitted that defendants had used Ecstasy several times. He explained that, in February 2004, armed robbers broke into his home and demanded "stuff" from him and Hammond. When Sheila arrived home during the robbery, the robbers sexually assaulted her. Eric testified that the robbery and sexual assault upset defendants and they followed Hammond's recommendation to use Ecstasy to express their feelings about the incident. By April or May 2004, however, Eric testified that Sheila had stopped using Ecstasy because they were planning to have a child.

At trial, Eric also offered a new explanation for the presence of the Ecstasy tablets and marijuana in his dresser. He claimed that Sheila went to West Michigan to visit a friend on August 13, 2004. On August 16, 2004, Eric realized he had not seen Hammond recently. When he searched Hammond's basement room, he recovered Ecstasy tablets and baggies of marijuana. Rather than dispose of the drugs or call the police, Eric testified that he hid the drugs in his dresser and planned to discuss the problem with Sheila when she returned from West Michigan. However, according to Eric, the police searched the home before Sheila returned.

II.

Eric raises claims this court has already addressed. First, Eric claims that independent corroboration of the marijuana found in the garbage bags was required. Eric suggests that such corroboration could have included additional evidence that the marijuana belonged to defendants or Detective Galeski's personal observation of drug activity at defendants' home. As we noted, *supra*, this Court previously rejected this argument. *Lively I*, *supra* at 7-8. Second, Eric claims that the good faith exception to the exclusionary rule was inapplicable because the search warrant was not just facially defective, but lacked probable cause entirely. This Court previously concluded that there was a substantial basis for the finding of probable cause, *id.* at 8-9, and that even if the warrant was invalid, the good faith exception would have precluded suppression. *Id.* at 8 n 2. "Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue." *Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997). Because this Court decided the challenges by Eric in the earlier appeal, and rejected them on the merits, these matters are not subject to further review in this claim of appeal.[4]

Next, citing to *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978), Eric argues that this Court should remand to the trial court for an evidentiary hearing regarding the veracity of Detective Galeski's statements in the affidavit that supported the search warrant. We disagree. In his initial motion to suppress, Eric alleged that Detective Galeski's statements regarding the garbage bags were false. However, the trial court suppressed the evidence obtained from the search warrant on other grounds and Eric did not request a *Franks* hearing during the initial appeal or on remand. Thus, Eric's claim is reviewed for plain error affecting his substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003).

"Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). Probable cause "exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992).

A presumption of validity exists with respect to the affidavit supporting the search warrant. *Franks*, *supra* at 171. If a defendant contends that false statements were made in the affidavit, the trial court should hold an evidentiary hearing to determine if the evidence obtained pursuant to the warrant should be suppressed. *Id.* Following the hearing, suppression is warranted if: 1) the defendant shows by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit, and 2) the false information was necessary to a finding of probable cause. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), citing *Franks*, *supra*. Notably, if the false material in the affidavit is set aside and "there remains sufficient content in the warrant

[4] Eric concedes that the law of the case doctrine applies to these two challenges.

affidavit to support a finding of probable cause, no hearing is required." *Franks, supra* at 171-172.

Eric notes that Detective Galeski stated that he retrieved defendants' garbage bags from the curb at approximately 4:00 p.m., on August 16, 2004 However, Eric argues that Detective Galeski's statement was knowingly and intentionally false because witnesses, including Eric, a neighbor and a representative from Waste Management, would testify that Eric carried the garbage bags to the curb at 3:15 p.m. and Waste Management removed them at 3:20 p.m. Even if the evidence obtained from the garbage bags, including marijuana stems, seeds, packaging, and proof of residency, is set aside, no hearing is required. *Franks, supra* at 171-172. Again, as this Court previously stated in *Lively I, supra* at 6*:*

> a reasonably cautious person could have determined that the information supplied by the informant stemmed from personal knowledge and was reliable. The informant gave the affiant specific information about his own purchase of narcotics from Hammond. The informant further advised the affiant that Hammond's nickname was "Tuffy" and that he was a student at Roosevelt High School. The affiant verified the information provided by the informant, checking both with the Wyandotte Police computer system and with school officials to confirm Hammond's identity and address. There is no reasonable basis for concluding that the information supplied by the informant, which was verified for accuracy, was unreliable.

It was not necessary for the police to further corroborate the informant's specific allegations of criminal activity with evidence obtained from the garbage bags. See *People v Levine*, 461 Mich 172, 184-185; 600 NW2d 622 (1999). Because sufficient content in the affidavit regarding the informant remains to support a finding of probable cause, we reject Eric's request for remand for a *Franks* hearing.

Eric also contends that he was denied the effective assistance of counsel at trial and on appeal because his counsel failed to: 1) request a *Franks* hearing during the previous appeal or following remand, and 2) investigate, interview and call witnesses to refute Detective Galeski's statements regarding the garbage bags. However, because a *Franks* hearing is unnecessary, Eric's attorney made a reasonable strategic decision not to pursue the hearing and supporting testimony, which would have been deemed futile. *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). Thus, Eric was not denied the effective assistance of counsel.

Lastly, Eric argues that he is entitled to a new trial because the prosecutor allegedly made improper comments, which were not cured with cautionary instructions. We disagree. "Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004) (internal citations omitted). We review preserved claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair or impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). However, review of unpreserved claims is limited to plain error affecting a defendant's substantial rights. *Abraham, supra* at 274. This Court will not reverse if the prejudicial effect of the prosecutor's comments could have been cured by a

timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005), aff'd 475 Mich 101 (2006).

On cross-examination, Eric admitted that he committed breaking and entering 17 years earlier. However, he stated that he "never broke into two people's houses." In response, the prosecutor stated, "quit trying to minimize your liability. You broke into two people's houses, didn't you?" Ultimately, Eric admitted to the two previous break-ins. As in *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007), where this Court concluded that the prosecutor's admonition to defendant not to be disingenuous was "somewhat argumentative," but did not deny the defendant a fair trial, here too, the prosecutor's admonition that Eric minimize his liability may have been argumentative, but not misconduct requiring reversal.

Later, on cross-examination, as Eric attempts to explain why he was untruthful in his statement to Detective Galeski, the prosecutor stated, "Do you think if you keep repeating the same lie it becomes the truth?" Eric asserts that the use of the word "lie" was prejudicial. Again, we disagree. The prosecutor's question did not unfairly depict the evidence regarding the interview and defendant's untruthful statements. A prosecutor has the right to elicit anything '"which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination."' *People v Bell*, 88 Mich App 345, 349; 276 NW2d 605 (1979), quoting *People v Dellabonda*, 265 Mich 486, 499-500; 251 NW 594 (1933). Furthermore, the prosecutor need not limit arguments to "the blandest possible terms." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

Next, on direct examination, Eric testified regarding the robbery and sexual assault that motivated defendants' use of Ecstasy. On cross-examination, the prosecutor questioned Eric regarding whether the robbers broke in to steal his drugs and whether he consequently shared some responsibility for the robbery and sexual assault. While this line of questioning by the prosecutor may not have been well considered, particularly as it relates to responsibility for the sexual assault Eric opened the door to the prosecutor's questions on this subject. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The questions were clumsy but permissible attempts to contradict Eric's effort to deny that he sold Ecstasy and further explain the robbery and sexual assault. *Bell*, *supra* at 349. Eric's attorney did not object to the prosecutor's line of questioning and defendant fails to demonstrate that it affected his substantial rights. *Abraham*, *supra* at 274. Rather, in response to the prosecutor's questions, Eric again explained that he did not sell drugs, he could not recall the robbers asking for drugs, and the only people responsible for the robbery and sexual assault were the assailants.

Last, during her closing argument, the prosecutor stated that defendants' practice of giving Ecstasy to Hammond as "warped" and suggested that defendants condoned drug use in their home. The use of the term "warped" did not unfairly depict defendants' illegal practice. *Matuszak*, *supra* at 56. Moreover, the trial court instructed the jury that the prosecutor's statements did not constitute evidence. In sum, the prosecutor's conduct did not deny Eric a fair and impartial trial.

III.

Sheila argues that the prosecutor failed to present sufficient evidence to support her felony-firearm conviction. We disagree. This Court reviews sufficiency of the evidence claims

de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In doing so, this Court must review "the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Sheila maintains that she could not have possessed the gun because she was not present in her home during the search and Eric testified that she had been in West Michigan for several days before the search. Possession of a firearm may be actual or constructive, and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession exists when a person knows the location of and has reasonable access to the firearm. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). It is irrelevant whether the defendant possessed a firearm at the time of arrest or at the time of a police search or raid. See *id.* at 439. Our Supreme Court stated:

> A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates specified in the information. [*Id.*]

Sheila was not charged with committing felony-firearm at the exact time of the search. Rather, as the trial court instructed the jury, it was the prosecutor's burden to prove that the crimes occurred on or about August 17, 2004. Where time is not an essential element of an offense, the date need not be proven beyond a reasonable doubt. See MCL 767.45(1)(b) (the information shall contain, "The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense."). Because the gun was located in Sheila's dresser and was registered to her, it was reasonable for the jury to infer that she knew of its location. Furthermore, because Sheila lived in the home and stored her clothes in the dresser with the gun, it was reasonable for the jury to infer that she had reasonable access to it when she was at home. Even if Sheila was not present at the exact time of the search or, according to Eric's testimony, during the during the weekend prior to the search, we must resolve all conflicts in the evidence in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Sheila also maintains that that the prosecutor failed to present sufficient evidence that, while she possessed the gun, she also committed the offense of possession of Ecstasy.[5]

> Possession of drugs occurs when the defendant has dominion and control over them. It occurs when the defendant knowingly has the power and intention to

[5] Because possession of Ecstasy is a felony offense, it can serve as the underlying felony for a felony-firearm conviction. MCL 333.7403(2)(b)(i).

> exercise dominion or control over the drugs either directly or through another person. Or, it occurs when the defendant is in proximity to the drugs and has control over them. [*Burgenmeyer, supra* at 439 n 12 (internal citations omitted.]

Eric told Detective Galeski that he had been purchasing Ecstasy from a friend for defendants' personal use for five or six months, and that both he and Sheila gave some pills to Hammond during this time. In addition, Eric testified that he received Ecstasy from a friend. This Ecstasy was found present in his unlocked dresser at the time of the search. Thus, even if the jury believed that Sheila left for West Michigan on August 13, 2004, it still could have believed she was in proximity to, and had control over, the Ecstasy Eric received on August 12.

Sheila counters that she allegedly stopped using drugs to get pregnant in April or May 2004. However, the prosecutor "need not disprove every theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Also, Sheila argues that the jury acquitted her of possession of Ecstasy, so it could not convict her of felony-firearm. This argument is unpersuasive because "a jury may reach inconsistent verdicts as a result of mistake, compromise, or leniency." *People v Goss*, 446 Mich 587, 597; 521 NW2d 312 (1994). Viewing the evidence in the light most favorable to the prosecutor, the jury could reasonably conclude that there was sufficient evidence to convict Sheila of felony-firearm.

Next, Sheila argues that the prosecutor failed to present sufficient evidence of possession to support her possession of marijuana conviction. However, Eric told Detective Galeski that the marijuana recovered during the search was for defendants' personal use. Again, the marijuana was stored in an unlocked dresser in her bedroom. Thus, the jury could reasonably conclude that Sheila had dominion and control over the marijuana to support the possession of marijuana conviction.

In Sheila's second claim on appeal, she argues that she was denied the effective assistance of counsel. We disagree. The trial court denied Sheila's motion for a new trial on this ground following remand from this Court for a *Ginther*[6] hearing. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). However, underlying questions of law, such as whether trial counsel was effective, are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004); *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Also, the trial court's factual findings are reviewed for clear error. *Id.* "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Grant, supra* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485-

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

Sheila argues that her attorney, Corbett E. O'Meara, was ineffective by alleging that he shared an office with Eric's attorney, Stanley A. Schulman. When two or more defendants whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, a trial court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. MCR 6.005(F); see also MRPC 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2."). In this case, there is no evidence that O'Meara and Schulman were associated in the practice of law or even shared an office when defendants hired them. Instead, at the *Ginther* hearing, Schulman explained that he merely referred Sheila to O'Meara because he and O'Meara had represented joint defendants in the past and O'Meara was an experienced criminal practitioner. At the time of the *Ginther* hearing, Schulman and O'Meara shared office space. There is conflicting evidence regarding when they began sharing space, before and after trial. Nevertheless, "two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm." See Comment, MRPC 1.10. Absent an actual conflict of interest between Schulman and O'Meara, Sheila's first claim of ineffective assistance of counsel fails. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998) ("in order to demonstrate that a conflict of interest has violated his Sixth Amendment rights, a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's performance.'").

Sheila next argues that O'Meara provided ineffective counsel by advising her not to testify. Sheila claims that O'Meara's advice not to testify was influenced in part by 1) pressure from Schulman, who Sheila contends did not want her to contradict Eric's testimony that he did not know Sheila had the gun or stored it in the dresser, and 2) the fact that O'Meara was indebted to Schulman because Schulman referred her case to O'Meara, and because of the payment structure between the attorneys. We find that the trial court did not err by concluding that O'Meara's advice did not fall below an objective standard of reasonableness. First, when Sheila retained O'Meara for the trial after this Court reinstated the charges against defendants she paid O'Meara directly. Second, at the *Ginther* hearing, both O'Meara and Schulman testified that in their opinion, Sheila had nothing to gain from testifying because her proposed testimony coincided with Eric's testimony. Furthermore, they each believed that Sheila risked exposure to cross-examination regarding her history of drug use and the sexual assault. They also feared that she would lose sympathy garnered from Eric's testimony that she had been sexually assaulted.

Sheila testified, contrary to the testimony of O'Meara and Schulman, that she would have testified that Eric knew she had the gun in her dresser. Regardless, she failed to testify, and there is no evidence, that Sheila ever communicated to either attorney that she would testify differently than Eric. O'Meara specifically testified that Sheila never told him that Eric knew about the gun. Instead, O'Meara testified that Sheila "emphatically and consistently proclaimed her husband's innocence" with respect to knowledge of the gun. Schulman and O'Meara further testified that defendants' recollections of the facts of the case were identical. Since the trial court concluded that O'Meara and Schulman's testimony on this point was more credible, "counsel cannot be

found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Sheila further argues, in passing, that O'Meara should have moved to sever the joint trial because "there was a very real problem of [defendants] testifying against each other." In *People v Hana*, 447 Mich 325, 348; 524 NW2d 682 (1994), our Supreme Court stated that MCR 6.121(C) mandates severance only when "a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." A defendant is not entitled to severance as a matter of law simply because the defendant and his or her codefendant have antagonistic defenses. *Id.* Instead, the Supreme Court held, "the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349. In other words, the "'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.*, quoting *United States v Yefsky*, 994 F2d 885, 897 (CA 1, 1993). As we concluded, *supra*, the attorneys believed defendants' recollections of the facts of the case were identical. Absent any known antagonism, O'Meara's decision not to file a futile motion to sever constituted trial strategy, which this Court will not second-guess. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Sheila also argues that she was denied the effective assistance of counsel because O'Meara failed to object to the trial court's instructions on two additional grounds. First, she notes that the jury acquitted her of possession of Ecstasy, but convicted her of possession of marijuana and felony-firearm. She assumes that the jury relied on the possession of marijuana conviction to support the felony-firearm conviction. Thus, she agues that O'Meara should have requested a clarifying instruction that possession of marijuana cannot serve as the underlying offense to support her felony-firearm conviction. The failure to request a clarifying instruction did not prejudice Sheila. The trial court repeatedly instructed the jury that a necessary element of felony-firearm was her commission of "the crime of controlled substance, possession of methamphetamine or Ecstasy." The jury is presumed to follow its instructions. *People v Bauder*, 269 Mich App 174, 195; 720 NW2d 287 (2006).

Second, Sheila argues that O'Meara was ineffective because he failed to request an instruction that the jury could not convict her of felony-firearm if it found that she was "100 miles away from the gun" when she possessed the Ecstasy. Sheila's argument is premised on her claim that she could only have possessed the Ecstasy at the time of the search on August 17, 2004. However, as we discussed above, the prosecutor alleged that these crimes occurred "on or about" August 17, 2004, and the date need not have been proven beyond a reasonable doubt. The trial court properly instructed the jury:

> Possession does not necessarily mean ownership. Possession means that either, one, the person has actual physical control of the firearm as I do the pen I now holding [sic]; or, two, the person has constructive possession by knowing the location of the weapon, and it is readily accessible to or easily obtained by the defendant at the time of the commission or attempted commission of the felony.

Because the jury was properly instructed, O'Meara was not ineffective for failing to make futile objections to the instructions. *Odom, supra* at 416.

Finally, Sheila claims that she was denied the effective assistance of counsel at sentencing on the basis that O'Meara's former wife, Catherine O'Meara, who served as substitute counsel for Sheila, had a conflict in representing Sheila because Catherine and Schulman shared an office. We disagree. These attorneys were not associated in the practice of law. MCR 6.005(F); see also MRPC 1.10(a). Furthermore, Sheila fails to argue how the attorneys' shared offices could have jeopardized her right to undivided loyalty from Catherine at sentencing. Sheila also claims that Catherine was unprepared to file motions for bond pending appeal, a new trial, or to set aside the jury verdict, but because Catherine's representation of Sheila was limited in scope to sentencing for the felony-firearm and possession of marijuana convictions, see MRPC 1.2., the record is clear that her performance did not fall below an objective standard of reasonableness. Catherine did not ignore Sheila's requests for additional advice, but rather, advised her to consult O'Meara and her appellate counsel at another time. Because Sheila fails to demonstrate any prejudice from Catherine's limited representation at sentencing, she was not denied the effective assistance of counsel during that proceeding.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder